



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

NOV 19 2008

Jennifer L. Blum, Esquire
Drinker Biddle & Reath, LLP
1500 K Street, N.W.
Suite 1100
Washington, D.C. 20005-1209

Re: MUR 6121
Advanced Medical Technology Association
AdvaMed PAC
Kenneth Mendez, Treasurer

Dear Ms. Blum:

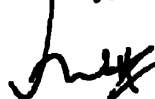
In the normal course of carrying out its supervisory responsibilities, the Federal Election Commission (the "Commission") became aware of information suggesting your clients, Advanced Medical Technology Association ("AdvaMed"), AdvaMed PAC, and Kenneth Mendez, in his official capacity as treasurer, may have violated the Federal Election Campaign Act of 1971, as amended ("the Act"). On October 29, 2008, the Commission found reason to believe that AdvaMed PAC and Kenneth Mendez, in his official capacity as treasurer, violated 2 U.S.C. §§ 432(b)(2)(B), 432(h)(1), 434(b), 441b(a), and 441b(b)(4)(D); and 11 C.F.R. §§ 114.8(c) and (d), 102.8(b)(2), 103.3(a), and 110.2(b)(3), provisions of the Act. The Commission also found reason to believe that AdvaMed violated 2 U.S.C. §§ 441b(a) and 441b(b)(4)(D), and 11 C.F.R. § 114.8(c) and (d). Enclosed is the joint Factual and Legal Analysis that sets forth the basis for the Commission's determination.

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We have also enclosed a brief description of the Commission's procedures for handling possible violations of the Act. In addition, please note that you have a legal obligation to preserve all documents, records and materials relating to this matter until such time as you are notified that the Commission has closed its file in this matter. See 18 U.S.C. § 1519. In the meantime, this matter will remain confidential in accordance with 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A), unless you notify the Commission in writing that you wish the investigation to be made public.

We look forward to your response.

Sincerely,



Donald F. McGahn, II
Chairman

Enclosures
Factual and Legal Analysis
Procedures

FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENTS: Advanced Medical Technology Association
AdvaMed PAC and Kenneth Mendez, **MUR: 6121**
in his official capacity as treasurer

I. INTRODUCTION

Advanced Medical Technology Association ("AdvaMed"), an incorporated nonprofit trade association of manufacturers of medical devices, diagnostic products, and health information systems, and its separate segregated fund, AdvaMed PAC, a multicandidate political committee registered with the Federal Election Commission ("Commission"), filed a *sua sponte* submission pursuant to the Commission's self reporting policy (72 Fed. Reg. 16,695, Apr. 5, 2007) to disclose certain irregularities regarding AdvaMed PAC's activities during the 2006 election cycle. Prompted by Requests for Additional Information ("RFAs") received from the Commission's Reports Analysis Division ("RAD"), AdvaMed retained outside counsel to conduct an internal compliance audit of AdvaMed PAC's operations. The compliance audit revealed improperly solicited contributions and various reporting errors. Additionally, the audit uncovered apparent corporate expenditures and other forms of corporate facilitation made for PAC-sponsored fundraising events on behalf of federal candidates.

The submission details corrective actions and the measures taken to prevent future violations. AdvaMed and the PAC assert that the irregularities, which pertain to a relatively small percentage of the PAC's transactions, were unintentional mistakes attributable to significant turnover of staff responsible for administering the PAC during 2006. Respondents represent that they have taken several comprehensive corrective and preventive actions in

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1 addition to self-reporting the irregularities. AdvaMed promptly retained outside counsel to assist
2 with a comprehensive internal compliance audit of the PAC's activities and reconciliation of the
3 PAC's bank account with the PAC's disclosure reports to resolve accounting discrepancies. It
4 hired an independent audit firm to verify the processes and results of the internal audit.
5 AdvaMed increased its monitoring of the PAC's daily activities, placed the then-PAC
6 Administrator on probation, and eventually terminated him. AdvaMed also hired a new PAC
7 Administrator, who has specific experience in administering a trade association PAC and who
8 has registered to attend one of the Commission's upcoming compliance seminars. AdvaMed has
9 further restructured the PAC's financial accounting system in line with the Commission's
10 recommended best practices for internal controls and has revised how it processes online
11 contributions. Finally, AdvaMed now relies on outside counsel to review its current activities.

12 **II. FACTUAL AND LEGAL ANALYSIS**

13 **A. Improperly Solicited Contributions**

14 The submission identifies two separate occurrences where contributions were solicited
15 contrary to the Commission's regulations governing fundraising by a trade association or its
16 separate segregated fund. The Federal Election Campaign Act of 1971, as amended, ("the Act")
17 prohibits a corporation from making a contribution or expenditure in connection with a federal
18 election. *See* 2 U.S.C. § 441b(a); 11 C.F.R. § 114.2(a). However, the Act permits a corporation
19 to establish, administer, and solicit contributions to, a separate segregate fund to be utilized for
20 political purposes. *See* 2 U.S.C. § 441b(b)(2)(C).

1 **1. Solicitations Outside Restricted Class**

2 The Act limits a trade association's solicitations to the restricted class, namely
3 stockholders and executive or administrative personnel (and the family members) of the trade
4 association or the trade association's members. 2 U.S.C. § 441b(b)(4)(D); 11 C.F.R. § 114.8(c);
5 *see* 11 C.F.R. § 114.1(j).

6 The PAC solicited and received 34 contributions totaling \$62,850 from sources outside
7 the restricted class during the election cycle. The PAC solicited twenty-two contributions
8 totaling \$58,900 from the PACs of AdvaMed's members, instead of the restricted class of those
9 members. Documents indicate that these improper contributions may have resulted from a
10 misinterpretation of the solicitation requirements. The PAC's solicitations incorrectly stated that
11 the Commission's regulations permit the PAC to solicit and receive contributions of up to \$5,000
12 from other PACs. *See* 11 C.F.R. § 114.7(j). The remaining 12 of the 34 contributions totaling
13 \$3,950 were from individuals connected with AdvaMed's partnership members, instead of the
14 partnerships themselves.¹ Thus, the PAC solicited contributions from outside its restricted class
15 in violation of the Act and the Commission's regulations.

16 AdvaMed or the PAC further solicited and received additional contributions totaling
17 \$1,850 from employees of nonmember companies through a raffle of four Washington Redskins
18 football tickets that AdvaMed sponsored to raise funds for the PAC in September 2006.

¹ The available information indicates that these individuals were not partners. The submission presents these individuals as non-solicitable individuals, characterizing them as "individuals of [partnership] members " or "individuals employed by [member] partnerships." The documents provided describe seven of the contributors as "consultants," one as "counsel", and another as "GA," an unknown acronym. There was no further description of the remaining 3 contributors.

1 Therefore, the PAC solicited and received the raffle proceeds in violation of the Act and the
2 Commission's regulations.

3 2. Unauthorized Solicitation of Members' Restricted Class

4 The Act permits a trade association with corporate members (such as AdvaMed) or the
5 association's separate segregated fund (such as the PAC) to solicit federal contributions from the
6 restricted class of its members only if the solicitation has been separately, knowingly, and
7 specifically pre-approved by the respective member. 2 U.S.C. § 441b(b)(4)(D); 11 C.F.R.
8 § 114.8(c) and (d). The Commission's regulations require a trade association to keep a copy of
9 each pre-approval of a solicitation for three years from the year for which the approval applies.
10 11 C.F.R. § 114.8(d)(2).

11 During the 2006 election cycle, the PAC solicited and received 56 contributions totaling
12 \$79,350 from the restricted class of AdvaMed's members without having the solicitations pre-
13 approved by the members. Thirty-nine contributions totaling \$47,000 were solicited and
14 received during 2005 and the remaining 17 contributions totaling \$32,350 were solicited and
15 received during 2006. AdvaMed and the PAC acknowledge that they did not have on file the
16 requisite copies of pre-approvals for the solicitations. Thus, the PAC has solicited and received
17 contributions that were not preapproved by AdvaMed's members, in violation of the Act and the
18 Commission's regulations.

B. Reporting Errors

The submission revealed several reporting errors during the 2006 election cycle, including inaccurate year end cash on hand balances, and misreported and unreported receipts, disbursements, and in-kind contributions from fundraisers.

1. Receipts

The Act requires a political committee to disclose to the Commission all of its receipts, and to do so accurately and completely. See 2 U.S.C. §§ 434(b)(2)(A) and (D), and 434(b)(3)(A) and (B); 11 C.F.R. § 104.3(a). The PAC made the following reporting errors with respect to receipts:

- It failed to disclose 11 contributions from individuals totaling \$5,800.²
- It misreported 9 contributions totaling \$8,750. All of the contributions, except one, were disclosed with inaccurate dates of receipt; the discrepancies in the receipt dates ranged from 11 months (Raissa Downs) to 14 days (Gerald McAteer) after the actual receipt date.
- It misreported a \$1,000 contribution as a \$2,000 contribution.
- It reported as a contribution a \$150 check from The Congressman Joe Barton Committee that was intended for a vendor as payment for fundraising services from the Barton Committee to the PAC. The PAC misdeposited the \$150 check, which was payable to the vendor, Van Scoyoc Associates, Inc., not to the PAC.

² Seven of the contributions totaling \$800 were from individuals in the amounts of \$200 or less and were not required to be itemized on the PAC's disclosure reports. See 2 U.S.C. § 434(b)(3)(A); 11 C.F.R. § 104.3(a)(4)(i).

2. Disbursements

The Act requires a political committee to disclose all of its disbursements or expenses it incurs on behalf of federal candidates, and to do so accurately and completely. *See* 2 U.S.C. §§ 434(b)(4)(H)(i) and (v), and 434(b)(6)(B)(i) and (v).

According to the submission, the PAC made the following errors with respect to disbursements:

- It failed to disclose four contributions totaling \$6,500 that it made to federal candidates or PACs.³
- It failed to file Pre-Primary reports for two of the four undisclosed contributions totaling \$3,000 - a \$1,000 contribution to Representative Mary Bono's campaign committee, Mary Bono Committee, on May 12, 2006, and a \$2,000 contribution to Senator John Ensign's campaign committee, Ensign For Senate, on July 26, 2006. *See* 2 U.S.C. § 434(a)(4)(A)(ii).
- It misreported a \$2,000 contribution it made to Representative Melissa Hart as a \$3,000 contribution by the PAC.
- It failed to disclose or misreported a total of \$15,240 in fundraising expenses from several fundraisers (including the raffle) the PAC or AdvaMed hosted for federal candidates. *See* 2 U.S.C. § 434(b)(2)(A) and (4); 11 C.F.R. § 104.13(a)(2).
- It failed to disclose to the Commission \$2,180 in monthly service fees the PAC paid to the online service provider (eDonation) for processing the online contributions during the election cycle.
- It failed to disclose \$33 in bank fees during the election cycle.

³ One of the undisclosed contributions (\$1,000) was made to Senator Kent Conrad's campaign committee, Friends of Kent Conrad, and another contribution (\$2,500) was made to IMPACT, Senator Charles Schumer's PAC.

3. Cash on Hand Balances

In addition to complete and accurate disclosure of receipts and disbursements, the Act requires accurate disclosure of the amount of cash on hand at the beginning and end of the reporting period. *See* 2 U.S.C. § 434(b)(1); 11 C.F.R. § 104.3(a)(1).

According to the submission, the PAC's disclosure reports contain the following inaccuracies:

- It understated its 2004 year end cash balance by \$425 (it should have reported \$13,462.87 instead of \$13,037.87).
- It understated its 2005 year end cash balance and 2006 beginning cash balance by \$3,741.86 (it should have been reported as \$18,530.37 instead of \$14,788.51).
- It overstated its 2006 year end cash balance by \$3,615.35 (it should have been \$22,197.27 instead of \$25,812.62).

AdvaMed explains that the cash on hand discrepancies resulted mainly from the PAC's failure to promptly deposit contributions, particularly electronic contributions it received online. The online contributions were collected by eDonation, a third-party online service, which bundled the contributions and periodically forwarded the combined contributions (less processing fees) to the PAC by a single check. Consequently, the PAC did not have appropriate records of the actual receipt dates, and some contributions were not properly disclosed in the PAC's reports. Nevertheless, by disclosing inaccurate cash balances for 2004 year end and the 2006 election cycle, the PAC violated the Act. *See* 2 U.S.C. § 434(b)(1) and 11 C.F.R. § 104.3(a)(1).

4. Designation of Contributions

The Commission's regulations provide that a multicandidate committee contribution that is not specifically designated in writing to a particular election will be applied to the next scheduled election. *See* 11 C.F.R. § 110.2(b)(2)(ii).

In its disclosure reports, the PAC improperly designated to general elections 13 contributions totaling \$19,500 that were made prior to primary elections, without informing the recipient committees of the designations. The Commission's database shows that 9 of the recipient committees applied the PAC's contributions towards the primary election. Two of the recipient committees applied the PAC's contributions towards the general election, apparently because they received them after the primary election. Therefore, the PAC appears to have improperly designated on its disclosure reports 13 contributions totaling \$19,500 to the general elections when the contributions predated the primary election.

C. Forwarding/Deposit of Contributions

The Act requires every person who receives a contribution in excess of \$50 for an unauthorized political committee to forward the contribution to the committee no later than 10 days after receiving the contribution. 2 U.S.C. § 432(b)(2)(B); 11 C.F.R. § 102.8(b)(2). The transmittal requirement applies to a collecting agent. *See* 11 C.F.R. § 102.6(b). The PAC is responsible for ensuring that the transmittal requirement is met for its collecting agent. 11 C.F.R. § 102.6(c)(1). The Act also requires a political committee to deposit all receipts into a checking account. *See* 2 U.S.C. § 432(h)(1). The Commission's regulations require that such deposit be made within ten days of receipt of the contribution. 11 C.F.R. § 103.3(a).

1 The PAC's practice of having its online contributions bundled by a third-party and
2 periodically forwarded to the PAC by a single check resulted in the PAC not timely receiving and
3 depositing online contributions. Documents show that during the election cycle the PAC
4 received 18 online contributions totaling \$13,500 that were either untimely forwarded to the PAC
5 or otherwise deposited into the PAC's bank account after the expiration of the ten-day deposit
6 period. The contributions were forwarded up to 32 days after the contributions were actually
7 made and were deposited up to three months after receipt. The PAC also failed to deposit two
8 contributions totaling \$200 in violation of the Act.

9 **D. Corporate Expenditures**

10 The Act provides that a corporation may not make "a contribution or an expenditure in
11 connection with any election for federal office." 2 U.S.C. § 441b(a). As used in Section 441b,
12 the term "contribution" includes any direct or indirect payment, distribution, loan, advance,
13 deposit or gift of money, or any services, or anything of value to any candidate, campaign
14 committee, or political party or organization, in connection with a Federal election. 2 U.S.C.
15 § 441b(b)(2).

16 A corporation is prohibited from facilitating the making of contributions to candidates or
17 political committees, other than to the separate segregated fund of the corporation. See 11 C.F.R.
18 § 114.2(f)(1). Using corporate funds or facilities in connection with a federal election is a
19 violation of the Act, unless otherwise exempted or the costs of the facilities are paid for in
20 advance or are properly reimbursed. See 2 U.S.C. § 441(b)(a); 11 C.F.R. §§ 114.2(f) and 114.9.

21 Facilitation means using corporate or labor organization resources or facilities to engage in

1 fundraising activities in connection with any federal election, and includes providing catering or
2 other food services operated or obtained by the corporation, unless the corporation receives
3 advance payment for the fair market value of the services. *See* 11 C.F.R. § 114.2(f)(2).
4 Facilitation also includes, but is not limited to officials or employees of the corporation or labor
5 organization ordering or directing subordinates or support staff to plan, organize, or carry out the
6 fundraising project as a part of their work responsibilities using corporate resources, unless the
7 corporation receives advance payment for the fair market value of such services; soliciting
8 contributions earmarked for a candidate that are to be collected and forwarded by the
9 corporation's or labor organization's separate segregated fund, to the extent such contributions
10 also are treated as contributions to and by the separate segregated fund, and using a corporate list
11 of customers, clients, vendors or others who are not in the restricted class to solicit contributions
12 or distribute invitations to the fundraiser, unless the corporation or labor organization receives
13 advance payment for the fair market value of the list. *Id.*

14 The submission indicates that AdvaMed, rather than the PAC, paid certain expenses for
15 fundraisers on behalf of federal candidates during the 2006 election cycle. According to the
16 submission, AdvaMed and the PAC hosted 44 fundraisers on behalf of over 35 federal candidates
17 during the election cycle.⁴ One or more AdvaMed officials were listed as the contact person(s)
18 on the invitations, some of which included a disclaimer stating that they were "Paid for by" the

⁴ Documents show that the fundraisers included photo-ops with candidates and were conducted in conjunction with AdvaMed's Board meetings and in several other formats – breakfasts, luncheons, cocktail receptions, and a golf outing. The events were held mostly in hotels or restaurants (e.g. the Willard Hotel, and the Monacle, Sonoma, and Mings restaurants). In one instance, a reception in conjunction with an AdvaMed Board meeting was held at AdvaMed.

1 PAC and authorized by the respective candidate campaign committee. The disclaimer on the
2 invitations for other fundraisers provided in the submission stated that they were paid for by the
3 respective candidate committee. The invitations solicited contributions from individuals and
4 PACs. Contributors were instructed to send contributions directly to the respective candidate's
5 campaign committee, except in one instance where contributors were instructed only to make
6 checks payable to the candidate.

7 The documents provided show that AdvaMed paid for or advanced a total of \$17,930 for
8 fundraising expenses for food, beverage, room rental, and photography services related to twelve
9 fundraisers.⁵ A total of \$12,524.86 from seven fundraisers was not reimbursed by the PAC and
10 were not disclosed to the Commission.⁶ The remaining total of \$5,772.74 from five fundraisers
11 was reimbursed by the PAC approximately 13 to 119 days after the respective fundraisers.⁷
12 Therefore, it appears that AdvaMed violated the Act and Commission regulations by making in-
13 kind corporate contributions totaling \$17,930 in connection with federal elections by paying or
14 advancing funds for fundraising expenses that should have been paid by the PAC. See 2 U.S.C.
15 § 441(b)(a) and 11 C.F.R. § 114.2(f)(1).

⁵ Respondents state that they were unable to find relevant expense records for 25 fundraisers and assert that it was highly likely that a co-sponsor or the respective candidate's authorized committee paid for the associated expenses. Respondents further assert that there is no specific information showing that AdvaMed or the PAC was in fact responsible for making payments for the expenses. They provided information showing that expenses for 7 of the fundraisers were paid for by the campaigns or co-sponsors. There is no evidence suggesting that the authorized committees were aware that AdvaMed advanced funds for the fundraising expenses.

⁶ The documents provided were mostly from 2005 and consist primarily of vendor invoices to AdvaMed (some showing notations of payment) and redacted AdvaMed checks.

⁷ Most of the documents provided were from 2006 and consist primarily of the PAC's check payments to AdvaMed's corporate American Express credit card.

1 As previously described, AdvaMed conducted a fundraising raffle for Washington
2 Redskins tickets and the PAC did not reimburse AdvaMed for the related fundraising costs. The
3 Commission's regulations permit a membership organization to use general treasury funds to
4 solicit contributions to its separate segregate fund, provided that the treasury funds are not used
5 as a replacement of voluntary contributions. See 11 C.F.R. § 114.5(b). Use of treasury funds to
6 pay for a fundraising raffle is not a prohibited trade of treasury funds for voluntary contributions
7 to the separate segregate fund if the treasury funds do not exceed one third of the contributions
8 raised. See 11 C.F.R. § 114.5(b)(2) and Advisory Opinion 2006-33 at 3. The four Washington
9 Redskins football tickets were valued at \$2,116.08, and the PAC received additional
10 contributions totaling \$1,850 from the raffle. As the cost of the football tickets exceeds one third
11 of the total amount raised, the PAC should have reimbursed AdvaMed approximately \$1,500
12 (\$2,116.08 - \$616.67 (\$1,850 ÷ 3 = \$616.67)). See 11 C.F.R. § 114.5(b)(2). Therefore, the PAC
13 received a an additional \$1,500 in-kind corporate contribution from AdvaMed due to its failure
14 to properly reimburse the cost of the tickets that exceed one-third of the contributions received.

15 Therefore, there is reason to believe that AdvaMed PAC and Kenneth Mendez, in his
16 official capacity as treasurer, violated 2 U.S.C. §§ 432(b)(2)(B), 432(h)(1), 434(b), 441b(a), and
17 441b(b)(4)(D); and 11 C.F.R. §§ 114.8(c) and (d), 102.8(b)(2), 103.3(a), and 110.2(b)(3). There
18 is also reason to believe that AdvaMed violated 2 U.S.C. §§ 441b(a) and 441b(b)(4)(D), and
19 11 C.F.R. § 114.8(c) and (d).

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